Supreme Court, U. S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

NO. 80-9

LARRY GENE ERATH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Were the misstatements of fact made by Agent Perkins to the Magistrate done with a reckless disregard for the truth?

2. Was the information presented in the search warrant affidavit, assuming the excising of the falsehoods, sufficient to establish probable cause for the issuance of a search warrant for the package sent by petitioner?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a petition for LARRY GENE ERATH for a Writ of Certiorari to review the order made by the United States Court of Appeals for the Ninth Circuit on February 19, 1980, refusing to reverse petitioner's conviction for conspiracy to possess with intent to distribute cocaine in violation of Title 21, United States Code §§ 841(a)(1) and 846. The United States Court of Appeals for the Ninth

Circuit ruled that the false statements contained in the search warrant affidavit were not intentionally made or made in reckless disregard for the truth. The court further concluded that the warrant affidavit was sufficient even if the false statements were disregarded.

OPINIONS BELOW

To the petitioner's knowledge, the Memorandum Opinion in the United States Court of Appeals for the Ninth Circuit, affirming petitioner's conviction, has not been officially or unofficially reported as yet. (A copy of said Memorandum Opinion is attached hereto as Appendix "A".)

JURISDICTION

1. On December 6, 1978, the federal grand jury for the Southern District of California returned a three-count indictment against petitioner and two other persons, charging violations of 21 U.S.C. §§ 841(a)(1) and 846.

2. On April 10, 1979, petitioner was tried before the Honorable Howard B. Turrentine, United States District Judge, on "stipulated fact," and was convicted of conspiracy to possess with intent to distribute cocaine (Count I). On May 21, 1979, petitioner was committed to the custody of the Attorney General for a period of ten years and fined the sum of $25,000.00. In addition, a Special Parole Term of ten years was imposed pursuant to 21 U.S.C. § 841(b)(1)(A). Petitioner thereafter filed a timely Notice of Appeal.

3. On February 19, 1980, the United States Court of

Appeals for the Ninth Circuit affirmed petitioner's conviction, and on May 30, 1980, petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by said Court of Appeals. (A copy of the Order Denying Petitions for Rehearing and Suggestions for Rehearing En Banc is attached hereto as Appendix "C".)

CONSTITUTIONAL PROVISIONS

AND

STATUTES INVOLVED

Fourth Amendment to the United States Constitution.

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the places to be searched and the persons or things to be seized."

Title 21, U.S.C. § 841(a)(1)
and
Title 21, U.S.C. § 846

have been set forth as Appendix "B" hereto.

STATEMENT OF THE FACTS

In the early morning hours of November 27, 1978, Mr. Fernando Pelaez, Customer Service Agent with United Airlines, Seattle-Tacoma Airport, Baggage Service Office, was contacted by a customer, identified as defendant JEFFREY CAMP, who wanted to send a package to San Diego. When questioned by Mr. Pelaez as to the contents of the package,[1] CAMP advised that it contained property contracts.

After CAMP paid for the shipment and left, Mr. Pelaez became suspicious, as the size of the package was too little to fit regular contract papers but was the same size as United States currency. Without opening the package, Mr. Pelaez compared a $1.00 bill with the package and found them to match perfectly in size. Mr. Pelaez next squeezed the package, finding that although it could be compressed, it was hard like a stack of paper. Suspecting that the package contained money, Mr. Pelaez contacted DEA Agent Jerry Snyder.

In the ensuing conversation, Mr. Pelaez told Agent Snyder about the events which had taken place and his suspicions that the package contained cash. When asked

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[1]Pursuant to company policy, Mr. Pelaez filled out a form containing pertinent package information, including a question concerning the contents of the package. This question is designed to insure that no dangerous goods are placed on board the aircraft.

by Agent Snyder to give an estimate of how much money was in the package, Mr. Pelaez stated there was between $5,000 - 10,000. During questioning at the motion hearing, both Mr. Pelaez and Agent Snyder testified that, as the package was never opened, it was just a guess on their part that the package contained currency and what the amount of that currency was.

Agent Snyder thereafter called law enforcement authorities in San Diego and advised them of the situation, as the package was addressed to petitioner in the San Diego area. The information was eventually passed along to Agent Perkins, a Deputy Sheriff for San Diego County who was assigned to the Narcotics Task Force. Agent Perkins prepared an affidavit to secure a search warrant for the package, which affidavit contained the following chronology of events:

(1) Information from Agent Reese, via McNamara and Snyder, revealed that a small box said to contain contracts but "in fact" containing $10,000 cash was being air freighted from Seattle to San Diego (Affidavit, p. 1).

(2) The box was addressed to Larry Erath and a telephone number was given on the form advising where Mr. Erath could be reached (Affidavit, p. 1).

(3) Mr. Erath was listed in the NADIS [DEA] computer along with the notation that he was to sell a federal agent one pound of cocaine in June, 1977, although the deal had fallen through (Affidavit, p. 1).

(4) At 11:15 a.m. Mr. Erath arrived at United Airlines in San Diego to pick up his package. He was advised that it had been lost in transit. Mr. Erath would not give the airline clerk an address or phone number where he might be reached. Instead, he said he would call back periodically to see if the package had been located (Affidavit, p. 2).

(5) Mr. Erath left the airport in a 1972 white Datsun 240Z (Affidavit, p. 2).

(6) A tracer on the package revealed it had been mistakenly shipped to Sacramento, California, and would arrive in San Diego at 3:25 p.m. (Affidavit, p. 2).

(7) On arrival the package appeared to be the size of U. S. Currency. It was wrapped in brown paper and sealed with scotch tape (Affidavit, p. 2).

(8) United Airlines called Mr. Erath at the number listed on the mailing form at 5:25 p.m. He stated that he would pick up the package that evening (Affidavit, p. 3).

(9) At 7:55 p.m. Mr. Erath picked up the package and took it to his car. Once there, he appeared to open the package and count the money (Affidavit, p. 3).

(10) Mr. Erath then left the vehicle and went to Western Airlines, where he shipped a 4" x 6" x

2" box to Camp (Affidavit, p. 3).

(11) Although he had presented an I.D. in the name of Larry Erath when receiving his package from United Airlines, Erath used the name Dave Johnson when mailing his own package. He told the airline agent that he was mailing wood carvings (Affidavit, p. 3).

The package sent by petitioner was held by Western Airlines while the NTF agents awaited the arrival of Federal Magistrate Harry McCue, who was en route to the airport. Upon reviewing Agent Perkins' affidavit and notes, Magistrate McCue asked him to clarify the source of the information that the Seattle package contained $10,000 cash.[2] Agent Snyder advised him, and amended the affidavit to reflect, that the information was "according to ticket clerk" (Affidavit, p. 1). Magistrate McCue then issued a warrant to search the package mailed by petitioner to Camp. A search revealed that the package contained approximately one-half pound of cocaine.

The affidavit was then amended to include the additional information that cocaine had been found in the package. Based on the original affidavit plus the sworn addendum, two more warrants were issued, one authorized the search of petitioner's car for money which he allegedly had received in exchange for the

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[2]Before signing the affidavit, Agent Perkins called Agent Snyder. During this conversation, Agent Snyder testified that he advised Agent Perkins of what he had been told by Mr. Pelaez, but that the subject of money never entered into the conversation. Agent Perkins, on the other hand, testified that Agent Snyder told him that Mr. Pelaez had opened the package and that it contained approximately $8,000 - 10,000. Agent Snyder, who testified after Agent Perkins, stated that this statement was incorrect.

cocaine. This search revealed $13,735 in cash. The third warrant authorized a search of the house where petitioner was staying. This search yielded $25,440 in cash, 760 grams of cocaine, marijuana, hashish, cutting agents and various narcotic paraphernalia.

REASONS WHY THE WRIT SHOULD BE GRANTED

Prior to this Court's decision in *Franks v. Delaware*, ... U.S. ..... , 98 S. Ct. 2674 (1978), the federal courts were divided as to what type of challenge, if any, could be made to attack the factual validity of a search warrant affidavit. A number of courts held that a finding of probable cause by a United States Magistrate was conclusive unless arbitrary, and thus not subject to challenge on the basis of the supporting affidavit's inaccuracy. At the other extreme, some courts held that a showing that false statements were made by an affiant to a Magistrate automatically vitiated the warrant and required suppression of the seized evidence. Still other courts took a middle ground and held that it was for the reviewing court to decide whether probable cause existed in the case, independent of the honest belief of the officer.

The Court in *Franks* attempted to resolve this confusing situation by finally establishing the rule that criminal defendants could challenge the validity of search warrants based on affidavits containing statements that are deliberately false or made with reckless disregard for the truth. The test for determining whether a defendant is entitled to such a hearing is two-pronged. First, he or she must make a "substantial

preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. Second, the court must determine if the challenged material is necessary to a finding of probable cause. If, at the hearing, the defendant establishes perjury or reckless disregard for the truth, and excision of the challenged matter leaves the affidavit with insufficient content to establish probable cause, the warrant must be voided.

While the *Franks* decision has resolved the question of whether to allow challenges beyond the face of a search warrant affidavit, it is submitted that the ambiguities concerning the question of what inaccuracies should be fatal to the warrant still remain. In every case an affiant's misstatement will either be material to the finding of probable cause or it will be superfluous. In every case, also, the affiant will have supplied the misstated allegation either intentionally, negligently, or innocently.

In the first and third situations, the courts appear to have been uniform in their decisions. When there is shown to be deliberate government perjury (intentional misstatement by an affiant-agent), such conduct requires automatic suppression of the evidence even if the misstatements were immaterial to proving probable cause. The fullest deterent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing. On the other side of the coin, innocent misrepresentations by the affiant, even if material, would not justify suppression of the resulting evidence. As previously indicated, the primary justification for the exclusionary rule is to deter police misconduct, and good faith

errors cannot be deterred. Furthermore, such errors do not negate probable cause. If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then, even if mistaken, he still has probable cause to believe that a crime has been committed. It is true that the warrant will have been issued on inaccurate data, but the Fourth Amendment does not proscribe "inaccurate" searches but, rather, only "unreasonable" ones.

The more difficult situation is that of a negligent or unreasonable assertion in an affidavit, usually due to the negligent personal investigation of the affiant himself. While such misrepresentations are theoretically deterrable, no working test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further. To provide some guidance to the numerous appellate and district courts which are confronting this issue more and more, it is suggested that this Court should announce a rule that would require suppression of evidence where the negligent misrepresentation is *material* to showing probable cause. Such a rule should prod law enforcement officers to make prudent investigations about as well as would a full-scale exclusionary rule, since the officers will usually not know until they apply for the warrant which allegations will be critical. They will therefore probably seek to gather as much untainted evidence as possible to support the warrant against challenge. Therefore, petitioner requests this Honorable Court to adopt the rule that courts must suppress evidence when obtained under a warrant which would not have issued but for the negligent misstatement by the affiant.

Had such a rule been applied to the facts in the case at bar, there is no question that the evidence seized pursuant

to the warrants should have been suppressed. The misstatements made by Agent Perkins, assuming arguendo they were not made in reckless disregard for the truth, clearly involved negligence in the follow-up investigation.

Prior to applying for the warrant, Agent Perkins spoke directly with Agent Snyder and failed to even verify that the package sent by Camp contained currency in any amount. Agent Perkins also failed to verify any of the facts concerning the year and one-half old incomplete cocaine transaction petitioner allegedly was involved in. As these two pieces of information were by far the most critical to establishing probable cause, the negligent and reckless manner in which Agent Perkins provided this information to the Magistrate should have required their excision from the affidavit. Such a holding would have been consistent with the aims of the Fourth Amendment and the exclusionary rule.

ARGUMENT

A. The Misstatements Of Fact Made By Agent Perkins To The Magistrate Were Done With A Reckless Disregard For The Truth And Should, Therefore, Have Been Excised From The Affidavit.

In the recent Supreme Court decision of *Franks v. Delaware, supra,* this Court addressed the issue of when a defendant may attack the veracity of a warrant affidavit after the warrant has been issued and executed. In a well-reasoned opinion written by Justice Blackmun, a majority of the Court agreed with the following ruling:

"[W]e hold that, where the defendant makes

> a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of prejury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." (98 S. Ct. at 2676.)

Applying these principles to the case at bar, it is submitted that the misstatements contained in the warrant affidavit were made by Agent Perkins with a reckless disregard for the truth.

(1) **$10,000 Statement**

The appeals court concluded in this case that the misstatement concerning the $10,000 was due to simple negligence and, hence, did not require excision from the warrant affidavit. The basis of the court's decision appeared to be the number of different individuals the information passed through before it got to

Agent Perkins. A review of the transcript clearly indicates that this was not the case. During his cross-examination, Agent Perkins testified that he called Agent Snyder prior to requesting issuance of a warrant, for the specific purpose of obtaining details of the case directly from the source rather than second- or third-hand. He also testified that Agent Snyder specifically told him that the package had been opened by Mr. Pelaez and that it contained approximately $8,000 - 10,000. Agent Snyder testified, on the other hand, that he only assumed the package contained currency in the approximate amount of $10,000, as neither he nor Mr. Pelaez opened it, and that the subject of money never entered into the conversation he had with Agent Perkins. Considering that there was this direct communication between the two agents, the discrepancies in their testimony can only be regarded by the Court as a clear incident of reckless disregard for the truth by Agent Perkins, which required excision of the statement from the warrant affidavit.

(2) **Prior Conduct Statement**

The information regarding petitioner's activities concerning the incomplete pound sale was nearly a year and one-half old. In *Sgro v. United States*, 287 U.S. 206, 52 S. Ct. 138 (1932), this Court invalidated a warrant issued after the sale of contraband by the defendant (liquor in violation of the Volstead Act), holding that while the federal statute did not fix any specific time "within which proof of probable cause must be taken

by a judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time" (287 U.S. at 209 - 210, 53 S. Ct. at 138). If this Court rejected as too remote in time an actual sale of liquor only 20 days prior to issuance of a warrant, then it is inconceivable that information regarding an unconsummated cocaine transaction nearly one and one-half years earlier could be relied upon for "probable cause" to believe that the individual was currently engaged in similar activity.

In addition, no other facts concerning this prior incident were presented to the Magistrate. There was no mention of how petitioner and the agent met, who initiated their contact, how many times they spoke, or the substance of any negotiations between them. The only thing that can be inferred from the statement in the affidavit was that a narcotics officer at one time thought that he could get the petitioner to sell him some cocaine. Petitioner's conduct did not lead to an arrest at that time, and in spite of being in the computer file of drug dealers, the petitioner did nothing in the ensuing year and one-half to justify an arrest for any drug violation. Thus, this statement also could not be relied upon to establish probable cause, due to the staleness of the information and the failure to adequately recite sufficient facts to justify the characterization of petitioner as a "known drug dealer."

B. The Remaining Information Presented In The Search Warrant Affidavit Did Not Establish

Probable Cause For The Issuance Of A Search Warrant For The Package Sent By Petitioner.

In determining the existence of probable cause, it is recognized that search warrant affidavits must be tested and interpreted by the Magistrate in a common sense and realistic fashion. *United States v. Ventresca,* 380 U.S. 102, 108 - 109, 89 S. Ct. 741, 746 (1965). It is also recognized, however, that a warrant cannot stand, even with the aid of constructional guides, if the affidavit is not based on information from which the Magistrate can make an independent determination of probable cause. Just as mere suspicion, or the existence of a possibility, that defendants have committed a crime does not justify an arrest (see *Mangaser v. United States,* 355 F.2d 971, 974 (9th Cir. 1964)), an affidavit containing only opinions and conclusions will not support a finding of probable cause for the issuance of a search warrant. See, generally, *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964); *Spinelli v. United States,* 393 U.S. 410, 89 S. Ct. 584 (1969). The Magistrate must be presented facts and not conclusory statements if he is to perform his detached function and not become a rubber stamp for the police. Thus, warrants should not be sustained when to do so would dilute "important safeguards that assure the judgment of a disinterested judicial official will interpose itself between the police and the citizenry" (n. omitted) *Spinelli v. United States, supra,* 393 U.S. at 419, 89 S. Ct. at 591.

In the case at bar, the suspicious acts relied upon by the court as indicative of narcotics trafficking were:

1. When petitioner picked up the package sent by Camp at the airport, he returned to his vehicle, opened the package, and "appeared" to be counting money.

2. Petitioner then used a fictitious name to send a package to Camp in Seattle, allegedly containing wood carvings.

It is submitted that these acts, when viewed against the absence of concrete information concerning petitioner's prior involvement with drugs, were just as consistent with innocent behavior as with guilty and simply offered no basis for a finding of probable cause.

In the recent case of *United States v. Post,* 607 F.2d 847 (9th Cir. 1979), one Richard Roberts attracted the attention of DEA agents as he paced the length of the Seattle airport, tightly holding a briefcase. The agents watched him meet Post, the appellant, and saw Post buy two one-way tickets to Los Angeles with cash. A check with the DEA computer indicated that in 1972 R. Post, a male of Seattle, was a known narcotics trafficker. Post and Roberts did not board their scheduled flight, nor a second flight on which they had reserved seats, but did board a third flight to Los Angeles. The DEA office in Los Angeles was then contacted and informed of what had been observed.

When the two men arrived in Los Angeles, they took a cab. During the cab drive, they were observed to repeatedly look out the back window as if to determine

whether they were being followed. They were also observed to open a briefcase and count a sum of money. The two went to Hermosa Beach, where they were observed to get out of the cab, stand on a corner, looking around, and then proceed to a building in the next block. These observations were reported back to the agents of Seattle.

When Post and Roberts arrived in Seattle the next morning, the two went to a rest room followed by one of the agents. Post went into a stall, and the agent saw him lift one leg and then the other. The two then left the rest room, and as they walked through the airport, they were stopped. After accompanying the agent to an interview room for questioning, Post was patted-down for weapons, and a bag containing cocaine was found on each leg.

Based on these facts, which are far stronger than the facts in the instant case, the court concluded that there was only a "founded" suspicion to justify an investigative stop but not, as the government conceded, probable cause to arrest or search. The court indicated that the two experienced agents could have concluded that the actions of the defendants were consonant with the behavior of drug couriers. There was also an added increment of suspicion, for the DEA computer had indicated that R. Post, of Seattle, had a history of narcotics trafficking. The district court's finding, that a founded suspicion justified detaining Post, was upheld. (See discussion 607 F.2d at 850.)

A similar result has been reached in a number of cases out of the Sixth Circuit and the Eastern District

of Michigan. From the myriad of cases having dealt with the "drug courier profile" issue,[3] the rule has emerged that the characteristics of the "drug courier profile" are not alone enough to provide probable cause to arrest nor necessarily enough to create a reasonable suspicion to stop under the *Terry v. Ohio* rationale. The analysis in all of the cases is similar. In finding that satisfaction of the "drug courier profile" falls short in most occasions of even providing "founded suspicion" to justify an investigative stop under *Terry,* the Court recognized that "[f]ounded suspicion requires some reasonable ground for singling out the person stopped as one who was involved or is about to be involved in criminal activity" (*United States v. McCaleb,* 552 F.2d 717, 720 (6th Cir. 1977), quoting from *United States v. Carrizoza-Gaxiola,* 523 F.2d 239, 241 (9th Cir. 1975)), inconsistent with innocent behavior (*United States v. Canales,* 572 F.2d 1182, 1186 (6th Cir. 1978)), or somehow distinguished from the general public (*United States v. Ballard,* 573 F.2d 913, 916 (5th Cir. 1978)). Or, as stated in *United States v. Westerhahn-Martinez,* 435 F. Supp. 690, 698 (E.D. N.Y. 1977):

> "The use of the words 'drug courier profile,' under these circumstances, adds nothing to the factors observed; these factors *must rise to the level of reasonable suspicion – or fall to the level of mere hunch on their own.*" (Em-

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[3]See United States v. Smith, 574 F.2d 882 (6th Cir. 1978); United States v. Canales, 572 F.2d 1182 (6th Cir. 1978); United States v. Pope, 561 F.2d 663 (6th Cir. 1977); United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), cert. denied, ... U.S. ..... , 98 S. Ct. 722 (1978); United States v. Craemer, 550 F.2d 594 (6th Cir. 1977); United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977); United States v. Floyd, 518 F. Supp. 724 (E.D. Mich. 1976); and United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich, 1976).

phasis added.)

Compared to the facts in the foregoing cases, the facts of the instant case were basically innocent. For here, the only observations made by the agents which might have aroused their suspicion were arguably the previously stated pattern of conduct which somehow resembled a "profile" for an on-going narcotics transaction. But, excluding the statements concerning the $10,000 and petitioner's prior conduct, and absent additional indicia of criminal activity above and beyond that indicated by observation of the profile factors, such observations did not even provide the "founded suspicion" necessary to justify an investigative stop under *Terry*, let alone the "probable casue" necessary to justify the issuance of a search warrant. Thus, the absence of such additional factors in the instant case requires this Court, especially in light of the opinions previously cited, to conclude that the search warrant for the package sent by petitioner was issued without probable cause, and that the contraband seized pursuant to that warrant and the subsequent warrant for petitioner's vehicle and residence should have been suppressed.

CONCLUSION

For the above-mentioned reasons, petitioner LARRY GENE ERATH respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

MEMORANDUM OPINION
[Filed February 19, 1980]

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JEFFREY CAMP and LARRY GENE ERATH, Defendants-Appellants.

Nos. 79-1409 and 79-1426

D.C. No. 78-0381.

Appeal from the United States District Court for the Northern District of California [sic] *

Before: GOODWIN, WALLACE and FARRIS, Circuit Judges.

Camp and Erath appeal from their convictions of conspiring to possess and distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. They contend that the district court improperly admitted into evidence cocaine found during a search conducted pursuant to a search warrant because there was not probable cause to issue the warrant. We affirm.

The search warrant in question was issued on the basis of a Narcotics Task Force agent's affidavit which included the following facts: (1) Camp had shipped a small box to Erath in San Diego said to contain property contracts "but in fact contained $10,000 according to the ticket clerk." (2) A computer check revealed that Erath was to sell Mike

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* The appeal was from the United States District Court for the Southern District of California.

Bookman, a Narcotics Task Force agent, one pound of cocaine in June, 1977 but the deal fell through. (3) Erath would not leave his address and claimed he had no phone when informed by a United Airlines clerk that the package was misdirected. (4) After the package arrived in San Diego, a Narcotics Task Force agent viewed it and concluded that it was the size of a bundle of United States currency. (5) Erath retrieved the package, returned to his car, "and appeared to open the package and count the money." (6) Erath, using the name Dave Johnson, then shipped a larger package, allegedly containing woodcarvings, to Camp. The subsequent search of this package (pursuant to the warrant) revealed that it contained a large quantity of cocaine.

Camp and Erath contend that the affidavit was insufficient to establish probable cause to issue the search warrant because: (1) the statement in the affidavit that the package sent to Erath "in fact contain[ed] $10,000 according to the ticket clerk" was a false statement made intentionally or recklessly, and (2) the remaining information in the affidavit was unreliable, innocuous or stale.

I
THE FALSE STATEMENT

No material statement in a warrant affidavit which is either intentionally falsified or made in reckless disregard for the truth can be used to establish probable cause. *Franks v. Delaware,* 438 U.S. 154, ... S. Ct. ....., ... L. Ed. 2d ..... (1978); *United States v. Young Buffalo,* 591 F.2d 506, 509 (9th Cir.), *cert. denied,* ..... U.S. ..... , 99 S. Ct. 2178, ... L. Ed. 2d ..... (1979). Here the statement that

the ticket agent said the package contained $10,000 was false. The ticket agent who accepted the package for shipment became suspicious of its size and informed a drug enforcement agent that it might contain as much as $10,000 in United States currency. This information then passed through three different individuals before it was written in the affidavit. A trier of fact could find that simple negligence accounted for the misstatement. See *United States v. Smith,* 588 F. 2d 737, 740 (9th Cir. 1978), *cert. denied,* 440 U.S. 967, 99 S. Ct. 1287, ... L. Ed. 2d ..... (1979). The district court's conclusion that the false statement was not made intentionally or recklessly is not clearly erroneous. See *United States v. Young Buffalo, supra.*

II
PROBABLE CAUSE

Probable cause to issue a search warrant is determined by reviewing the warrant affidavit as a whole. *United States v. Patterson,* 492 F.2d 995, 997 (9th Cir.), *cert. denied,* 419 U.S. 846, ... S. Ct. ..... , ... L. Ed. 2d ..... (1974). In borderline cases, deference will be accorded to the decision of the magistrate issuing the warrant. *United States v. Martinez,* 588 F.2d 1227, 1234 (9th Cir. 1978).

Camp and Erath maintain that, in reviewing the sufficiency of the affidavit, this court should disregard not only the reference to the $10,000 but also the statement about Erath's prior attempt to sell cocaine. We conclude, however, that the affidavit is sufficient even if these statements are disregarded. The reported behavior is suspiciously indicative of narcotics trafficking. See *United States v. Canada,* 527 F.2d 1374, 1376 (9th Cir.

1975), *cert. denied,* 429 U.S. 867, ... S. Ct. ..... , ... L. Ed. 2d ..... (1976). After Erath was observed apparently counting money, he used a fictitious name to send a package, allegedly containing woodcarvings, to Camp. The magistrate who issued the warrant could reasonably conclude that the total circumstances provided a basis to issue a warrant to search the package.

Affirmed.

APPENDIX "B"

STATUTES INVOLVED

21 U.S.C.

§ 841. Prohibited Acts. A—Unlawful Acts.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, a controlled substance.

§ 846. Attempt And Conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maxi-

mum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX "C"

ORDER DENYING PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARINGS EN BANC

[Filed May 30, 1980]

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEFFREY CAMP and LARRY GENE ERATH, Defendants-Appellants.

Nos. 79-1409 and 79-1426.

Before: GOODWIN, WALLACE and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the

suggestions for rehearing en banc are rejected.

†

SERVICE BY MAIL
CORRECTED PETITION FOR WRIT OF CERTIORARI

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: That pursuant to letter dated July 10, 1980, from the Office of the Clerk of the Supreme Court of the United States, the returned copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (ERATH v. UNITED STATES [No. 80-9]) were corrected as required by the Court, to wit: a white cover replaces the cover used, the questions presented are now placed first in the document, the order denying rehearing has been included in the appendix, and all tables and indexes have been corrected to reflect the changes made.

That on JULY , 1980, three copies each of the corrected document were served on the following named parties by depositing same in the United States Post Office in the City of Huntington Beach, enclosed in a sealed envelope with postage thereon fully prepaid, addressed to said parties at the addresses as follows:

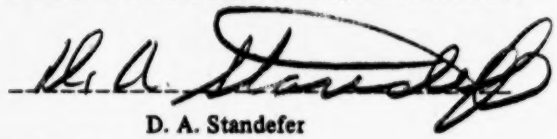
Wade H. McCree, Jr.
Solicitor General
U. S. Department of Justice
Washington, D. C. 20530

M. James Lorenz, United States Attorney
Southern District of California
940 Front Street
San Diego, California 92189

That corrected copies were also forwarded to MICHAEL PANCER, the attorney for petitioner, and the corrected 41 copies returned to the Supreme Court, so that, upon receipt, in accordance with the letter from the Office of the Clerk, the petition can be deemed filed as of July 3, 1980.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY , 1980, at HUNTINGTON BEACH, CALIFORNIA.



D. A. Standefer

(Original documents forwarded July 2, 1980.)

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161